No. 12390

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KAUFMAN-BROWN POTATO COMPANY, a Partnership composed of Charles H. Kaufman and Albert H. Brown, CHARLES H. KAUFMAN and ALBERT H. BROWN,

Appellants,

vs.

WAYNE LONG, as Trustee in Bankruptcy of the Estates of Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a Co-Partnership; Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, a Co-Partnership; GERRY HORTON, an individual, and J. D. ALTHOUSE, an individual,

Appellees.

BRIEF FOR APPELLANTS ON CONSOLIDATED APPEALS.

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Preliminary Statement as to Three Appeals.

Pursuant to order of this Court, three appeals, to wit:

(a) Appeal filed August 24, 1947, from Order of United States District Court for the Southern District of California;

(b) Appeal from Order of United States District Court for the Southern District of California, entered in Judgment Book 5, page 258, re Adjudication in Bankruptcy, and

(c) Appeal from Order of United States District Court for the Southern District of California, entered in Judgment Book 5, page 271, re Disallowance of Claim,

were consolidated for printing, briefing and hearing purposes. Said consolidation was for the reason that there was the same designation of the records, proceedings and evidence to be contained on the record of appeal in each of said appeals, and also that the issues to be determined in connection with said appeals are primarily of like nature.

In the Bankruptcy proceedings in which said appeals arose, upon a petition for order amending, modifying and changing order of adjudication and upon an objection to the claim of Kaufman-Brown Potato Company, a Partnership, two orders were made by the Referee in Bankruptcy adverse to the appellants herein. Petitions for review were filed and duly heard and taken under submission by the Honorable Judge of the United States District Court.

Thereafter, on July 25, 1949, a Minute Order was entered affirming the order of the Referee, as amended,

which Minute Order did not specifically state which order of the Referee was affirmed. Thereafter, on August 29, 1949, two written orders were signed by Honorable C. E. Beaumont, Judge of the District Court, affirming respectively the order of the referee in respect to the modification of adjudication and the order respecting the objection to claim of Kaufman-Brown Potato Company, a Partnership.

In that the written orders were filed and entered more than thirty (30) days after the date of the Minute Order, appellants on August 24, 1949, and prior to the filing of the entry of the written orders, filed an appeal from the said Minute Order because of the possibility that such Minute Order might be considered to be a Final Order. After the written orders were signed, filed and entered, appeals were duly taken from each of said orders.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

It is contended that the U. S. District Court had jurisdiction by virtue of the provisions of Section 2A-1, Section 2A-10, and Section 5 of the Bankruptcy Act.

(a) The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear the appeals by virtue of Sections 24A and B and Section 25 of the Bankruptcy Act. The appeals are taken pursuant thereto and pursuant to Rules 73 and 75 of the Federal Rules of Civil Procedure.

(b) The pleadings necessary to show the existence of the jurisdiction are as follows:

Petition for Order amending, modifying and changing order of adjudication and petition for Order to show cause directed against partners, filed by Wayne Long, Trustee of the Bankrupts [Tr. pp. 14-22];

Answer to Order to Show Cause, filed by Kaufman-Brown Potato Company, a Partnership [Tr. pp. 26-29];

Petition for Review of Kaufman-Brown Potato Company, a Partnership, and its partners, from Order of Referee amending and modifying the Order of Adjudication [Tr. pp. 49-54];

Proof of Unsecured Debt, filed by Kaufman-Brown Potato Company;

Objection to claim of Kaufman-Brown Potato Company, filed by Wayne Long, Trustee of the Bankrupts [Tr. p. 85];

Petition for review of Order of Referee in reference to claim of Kaufman-Brown Potato Company, filed by Kaufman-Brown Potato Company, a partnership, and its partners [Tr. pp. 93-97];

Notice of Appeal from Minute Order filed August 24, 1949 [Tr. p. 109];

Notice of Appeal filed September 22, 1949, from Order entered in Judgment Book 5 at page 258 [Tr. p. 110];

Notice of Appeal, filed September 22, 1949, from Order entered in Judgment Book 5 at page 271 [Tr. p. 111].

(c) Facts are those set forth in next sub-division.

Statement of the Case and Questions Presented.

In October and November of 1943, Gerry Horton, one of the co-partners of Gerry Horton Company, a co-partnership composed of said Gerry Horton and J. D. Althouse, and also one of the co-partners of Gerry Horton Farms, a co-partnership composed of the same two individuals, went to the office of Kaufman-Brown Potato Company in Chicago, Illinois, and talked to Charles H. Kaufman and Albert H. Brown, co-partners of Kaufman-Brown Potato Company [Tr. pp. 145-247]. In the conversation Horton requested Kaufman-Brown Potato Company to finance a growing deal on some land at Shafter on which Gerry Horton Farms held a lease [Tr. pp. 145, 252]. Details of such financing were discussed to the effect that Kaufman-Brown Potato Company was to put in the necessary money to bring the crop up to harvest and, in return, was to receive a percentage of the deal with the privilege of buying the potatoes at market price and was to be given a crop mortgage as security [Tr. pp. 146, 256, 259]. As a result of this conversation, and a telephonic conversation the next day between Horton and Kaufman (Horton being then in Minneapolis) Kaufman stated that his company would take the deal [Tr. p. 249]. Horton stated that he would have contracts drawn up in Los Angeles and sent back to Chicago [Tr. p. 249]. Counsel for Gerry Horton Farms then drew up the agreements, note and chattel mortgage and same were executed, being signed on behalf of Kaufman-Brown Potato Company at Chicago and on behalf of Gerry Horton Farms in California [Tr. p. 278, 147]. The contract so executed was introduced in evidence as Respondents' Exhibit "E" and is set forth in the transcript of record pp. 175-181. As a

result of a further conversation between the parties [Tr. p. 148] a like deal was arranged for the financing of the growing of a potato crop on a lease held by Gerry Horton Farms at Arvin, California. The contract covering this deal was introduced in evidence as Respondents' Exhibit "D," and is set forth in the transcript of record pp. 169-175. The form of the two contracts are identical with the exception of the dates, description of the real properties, amounts to be advanced and percentage interests. Under the terms of the two contracts Kaufman-Brown Potato Company were required to advance to Gerry Horton Farms $17,800.00 on the Shafter deal and $19,250.00 on the Arvin deal, or a total of $37,-050.00. Kaufman-Brown Potato Company not only advanced such sum so required, but advanced additional amounts so that its total advancement in connection with said deals was $42,694.82 [Tr. p. 156]. After harvesting and sale of crops $20,000.00 was repaid [Tr. p. 163].

Pursuant to the contracts Gerry Horton Farms planted, raised and harvested the crops. At all times said partners Gerry Horton and J. D. Althouse retained full title to the leases and the equipment used in the growing operations [Tr. p. 270]. Kaufman-Brown Potato Company had no part or control in the management, planting or harvesting of the potato crops [Tr. pp. 271-272]. Moneys received by Gerry Horton Farms, first party to said agreements, and composed of Gerry Horton and J. D. Althouse, both as to advancements from Kaufman-Brown Potato Company and from the sale of crops, were deposited partly in the bank accounts of said Gerry Horton Farms and partly in the bank account of Gerry Horton Company. Kaufman-Brown Potato Company had no right to sign checks upon said accounts [Tr. p. 272] nor

did Kaufman-Brown Potato Company employ or discharge any employees engaged in said potato operations [Tr. p. 271]. After the potatoes were harvested, Gerry Horton Farms sold the same [Tr. p. 275]. A considerable portion was purchased by Kaufman-Brown Potato Company in accordance with the right given it to purchase under the contract [Tr. p. 162]. Kaufman-Brown Potato Company paid the money covering the purchase price to the said Gerry Horton Farms and same was deposited as aforesaid, partly in its account and partly in the account of Gerry Horton Company [Tr. pp. 273, 276]. The operations resulted in a loss of from $20,000.00 to $25,000.00 [Tr. p. 275].

On August 5, 1944, an involuntary petition of bankruptcy was filed against Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a co-partnership, Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, a co-partnership, Gerry Horton, an individual, and J. D. Althouse, an individual, by three creditors, one of which creditors was Kaufman-Brown Potato Company [Tr. p. 2]. Thereupon the proceeding was referred to Walter A. Berkman, a Referee in Bankruptcy of the Court [Tr. p. 10]. After proceedings were duly had each of said parties against whom said petition was filed was adjudicated a bankrupt on Order made and entered by said Referee on August 15, 1944 [Tr. p. 11]. Later, Waldo R. Bergman retired as Referee and was succeeded by William A. McGugin, the present Referee [Tr. p. 30]. Wayne Long was appointed and qualified as Trustee in Bankruptcy of the estates of the Bankrupts [Tr. p. 13]. In the course of the bankruptcy proceeding Kaufman-Brown Potato Company filed its proof

of claim against the bankrupts for $23,479.79 [Tr. p. 81]. Said amount was made up of $22,594.82 representing the balance unpaid on advancements, as hereinbefore set forth, and $884.97 representing over-drafts drawn on the claimant by Gerry Horton Company [Tr. p. 82].

On October 24, 1946, Wayne Long, as Trustee of said Bankrupt Estates, filed objections to said claim on the ground that claimant was a joint adventurer or a partner with the bankrupts in a portion of the operations of the bankrupt, namely, the farming operations [Tr. p. 85]. On November 15, 1946 said Wayne Long, as Trustee, filed his "Petition for order Amending, Modifying and Changing Order of Adjudicating and Petition for Order to Show Cause directed against Partners" on essentially the same grounds urged in the objection to claim [Tr. p. 14]. Hearings were held resulting in the orders complained of in these appeals. From the foregoing, questions arose as follows:

Questions Involved and Presented.

(1) Did the Proceedings in this bankruptcy case justify the Court in entering an order adjudicating Gerry Horton Farms, an alleged co-partnership engaged in the raising of potatoes, a bankrupt?

(2) Was Kaufman-Brown Potato Company a co-partner with Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, in a co-partnership?

(3) Was the order of the Court in respect to the proof of debt filed by Kaufman-Brown Potato Company erroneous?

Specifications of Error Relied Upon.

(a) Appellants contend that the judgment of the District Court and the findings of fact and conclusions of law upon which the same was based in respect to the judgment entered in Judgment Book 5, page 258, involving the matter of the Modification of Order of Adjudication, was erroneous in the following particulars:

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court in adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes, composed of Kaufman-Brown Potato Company, a co-partnership consisting of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, bankrupt, was erroneous in that said Kaufman-Brown Potato Company was not a co-partner and there was no such partnership, and also in that neither the proceedings had nor the evidence adduced permitted or justified such Order.

III.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company, and the co-partners composing it, namely,

Charles H. Kaufman and Albert H. Brown, are liable for the payment of the debts and obligations of Gerry Horton Farms, a co-partnership, and the costs and expenses in the bankruptcy proceedings, since it should have decreed that said Kaufman-Brown Potato Company and its co-partners were not liable for the debts and expenses involved in such bankruptcy proceedings.

IV.

The Order, Judgment and Decree of the Court was erroneous in that Kaufman-Brown Potato Company, and the said co-partners composing it, did not consent to the adjudication in bankruptcy in this proceeding of any parties except Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a co-partnership; Gerry Horton and J. D. Althouse doing business as Gerry Horton Farms, a co-partnership; Gerry Horton, an individual, and J. D. Althouse, an individual, and did not consent or request that the court administer any estates or the property of any estates other than the estates and the property of the above-named parties.

V.

The findings of fact and conclusions of law upon which said Order, Judgment and Decree is based are not supported and not justified by the evidence in the case.

VI.

The Order, Judgment and Decree of the Court and the findings of fact and conclusions of law upon which said Order, Judgment and Decree is composed are erroneous, in that Kaufman-Brown Potato Company was not a co-partner with Gerry Horton Farms in any partnership;

in that no such co-partnership was ever intended to be formed, or was formed between Gerry Horton Farms and Kaufman-Brown Potato Company; in that Kaufman-Brown Potato Company did not have its California office at the office of Gerry Horton Farms; in that Kaufman-Brown Potato Company did not have the right to make contracts, incur liabilities, or manage or control the business of Gerry Horton Farms in connection with the growing of potatoes or at all, and did not make contracts, incur liabilities, manage or control such business; in that Kaufman-Brown Potato Company did not jointly with Gerry Horton Farms, or at all, participate in the management or control of the business of Gerry Horton Farms in connection with the growing of potatoes; in that neither Kaufman-Brown Potato Company nor Charles H. Kaufman nor Albert E. Brown, its co-partners, consented to an adjudication in bankruptcy of any parties other than those adjudicated bankrupt in the original order of adjudication, nor to an administration of the estates or property other than the estates and property of such parties; in that Kaufman-Brown Potato Company did no acts and participated in no acts set forth in said findings as done by Kaufman-Brown Potato Company in connection with Gerry Horton Farms, save and except things done by it pursuant to its agreement with Gerry Horton Farms, which things so done by it were not done as a partner of Gerry Horton Farms; in that no false representations were made to the Court respecting the status of Kaufman-Brown Potato Company, and in that Kaufman-Brown Potato Company was a creditor of Gerry Horton Farms, a partnership composed only of Gerry Horton and J. D. Althouse.

VII.

The Order, Judgment and Decree of the Court was erroneous in that it adopted the order of the Referee as amended, the findings of fact and conclusions of law of the Referee as amended, and approved and confirmed the same, though the errors herein complained of in respect to the order of the Judge of the District Court exist and apply with equal force to the said order, findings of fact and conclusions of law of the referee as amended by the Court.

(b) Appellants contend that the judgment of the District Court and the findings of fact and conclusions of law upon which same was based in respect to the judgment entered in Judgment Book 5, page 271, re Disallowance of Claim, was erroneous in the following particulars:

I.

The Order, Judgment and Decree of the Court was erroneous in that it decreed that Kaufman-Brown Potato Company was a general partner of Gerry Horton Farms, a partnership engaged in the raising of potatoes, though the evidence was insufficient to prove it was ever such a partner, and, on the contrary, established that it was not a partner.

II.

The Order, Judgment and Decree of the Court was erroneous in disallowing the major portion of such claim against Gerry Horton Company, a co-partnership, and in disallowing the said claim against Gerry Horton Farms, a partnership composed of Gerry Horton and J. D. Alt-

house, and was erroneous in making any order respecting an allowance with respect to Gerry Horton Farms, a partnership decreed to be composed of Kaufman-Brown Potato Company and Gerry Horton Farms, since Kaufman-Brown Potato Company was not a partner with Gerry Horton Farms in any partnership and such non-existent partnership was improperly adjudged to be a bankrupt.

III.

The findings of fact and conclusions of law upon which said Order, Judgment and Decree was based are not supported by and not justified by the evidence.

IV.

The Order, Judgment and Decree of the Court was erroneous in that it adopted the order of the Referee as amended, the findings of fact and conclusions of law of the Referee as amended, and confirmed the same, though the errors herein complained of in respect to the order of the Judge of the District Court exist and apply with equal force to the said order, findings of fact and conclusions of law of the Referee as amended by the Court.

(c) Appellants contend that the Minute Order of the District Court, dated the 25th day of July, 1949, is erroneous for the same reasons that the two written orders, above-described, are erroneous, and here adopt without repeating the same the same specifications of errors as set forth in respect to said written orders.

ARGUMENT.

I.

Did the Proceedings in This Bankruptcy Case Justify the Court in Entering an Order Adjudicating Gerry Horton Farms, an Alleged Co-Partnership Engaged in the Raising of Potatoes, a Bankrupt.

We deny that any partnership existed wherein Kaufman-Brown Potato Company was a partner with Gerry Horton Farms and later in this brief will cover that point. For the purposes of this phase of the matter we shall direct our argument to the point that the order of the Court adjudicating Gerry Horton Farms, a partnership engaged in the raising of potatoes and composed of Gerry Horton Farms and Kaufman-Brown Potato Company, was improper even if there was such a partnership. It is to be noted that the modification of the original Order of Adjudication simply added a new partnership as one of the bankrupts, such partnership being one in which Gerry Horton Farms, an adjudicated partnership, was found to be a general partner with Kaufman-Brown Potato Company.

Courts of bankruptcy are courts of limited jurisdiction (*Taft v. Century,* C. C. A. 8 Cir., 141 Fed. 369) and its limitations are fixed by the Bankruptcy Act (*In re Patterson MacDonald,* W. D. Wash., 284 Fed. 281); *Wheeling v. Moss,* C. C. A. 4th Cir., 62 F. 2d 37; *Chicago v. Carter,* C. C. A., 8th Cir., 61 F. 2d 986; *In re Prima,* C. C. A. 7th Cir., 98 F. 2d 952). Consent cannot confer jurisdiction over subject matter where jurisdiction does

not exist. (See cases cited in C. J. S., Vol. 21, p. 127, sec. 85, Note 50.) An order of adjudication was entered in this proceeding of a kind not sanctioned by the Bankruptcy Act. Section 5 of the Bankruptcy Act is the section primarily devoted to the question of partnership bankruptcies. Nowhere in that section, or any place in the Act, is there found any right to adjudicate a partnership a bankrupt in a proceeding of the nature with which we are dealing. We conclude from the order of the Court and the findings of fact and conclusions of law that the Court acting upon the assumption that Kaufman-Brown Potato Company being one of the petitioners in the bankruptcy proceeding wherein Gerry Horton Farms, a co-partnership, was adjudicated a bankrupt and in such petition Kaufman-Brown Potato Company having alleged an indebtedness which the Court found was in reality the indebtedness of another co-partnership wherein it was a partner of Gerry Horton Farms, that by its act in so doing and by its further act in filing a claim against said Gerry Horton Farms so originally adjudicated, and by allegedly concealing its status as a partner with Gerry Horton Farms, consented to the adjudication in bankruptcy and is estopped from denying that it so consented. Nowhere in Section 5, or any part of the Bankruptcy Act, is provision made permitting an adjudication in bankruptcy on such grounds.

Predicated on those grounds, possibly the Court would have had power to have drawn in Kaufman-Brown Potato Company as a partner in the adjudicated partnership of Gerry Horton Farms. In its order and its findings the Court was particularly careful, however, not to decree or find that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, a co-partnership composed of

Gerry Horton and J. D. Althouse, the adjudicated partnership, but did decree and find that it was a partner with Gerry Horton Farms in a separate partnership known as Gerry Horton Farms engaged in the growing of potatoes, and adjudicated such partnership to be bankrupt as a distinct partnership, separate and apart from Gerry Horton Farms originally adjudicated a partnership.

It is provided under *sub-division (i) of Section 5 of the Bankruptcy Act* that where one of the general partners of a partnership is adjudged a bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the general partner or partners, not adjudged bankrupt. It may be that the acts of Kaufman-Brown Potato Company were such that its consent to an administration of the assets in the bankruptcy proceeding might be implied. A solvent partner standing by without protest to the administration of the firm assets in a bankruptcy proceeding of an insolvent partner may be deemed to have consented thereto. It is to be noted, however, that a solvent member's participation in the bankruptcy proceeding against his co-partner by the presentation by an alleged provable claim upon which an attempt to vote for a trustee, will not constitute a waiver.

Tate v. Brinser, D. C. Pa. 226, Fed. 878.

Here, however, the Court goes further than the Bankruptcy Act permits. Without an act of bankruptcy having been alleged and with one of the alleged partners solvent, having a net worth of $100,000, the Court adjudicates that partnership to be a bankrupt.

Further, we contend that if it be deemed the Court had jurisdiction in the premises, nevertheless the premises

upon which the Court based its order of adjudication were not sound. There is nothing in the record upon which to predicate a consent on the part of the Kaufman-Brown Potato Company that the alleged co-partnership, of which it is alleged to be a member, might be adjudicated a bankrupt. Its position at all times was that Gerry Horton Farms, a partnership composed of Gerry Horton and J. D. Althouse, was indebted to it. Its petition in bankruptcy was aimed against that particular partnership. Its proof of debt was against that particular partnership. Its action in voting for a trustee was to vote for a trustee of that particular partnership. Whether its position was or was not correct that said particular partnership was indebted to it, there is nothing to show by the least implication that it was consenting that its indebtedness was against some other partnership or that it was doing any act at all with respect to some other partnership. We might point out further that even if its indebtedness was in reality an indebtedness against Gerry Horton Farms, a partnership composed of itself and Gerry Horton Farms, engaged in the growing of potatoes, that Gerry Horton Farms, the partnership composed of Gerry Horton and J. D. Althouse, was nevertheless indebted to it. Such partnership, if it existed, lost from $20,000.00 to $25,-000.00. The loss was all borne by Kaufman-Brown Potato Company and under the agreements Gerry Horton Farms, the partnership composed of Gerry Horton and J. D. Althouse, was indebted to it at least by way of

contribution. Nor is there anything in the record upon which to predicate a finding that Kaufman-Brown Potato Company made fraudulent representations or concealments of its status. The entire course of conduct of Kaufman-Brown Potato Company, and which hereafter in this brief will be argued more extensively, shows that it did not deem itself to be a partner of Gerry Horton Farms. It will be for this Court to pass upon the question as to whether it was correct in its viewpoint. If, in fact, a partnership existed, nevertheless it is a far cry from acting under an incorrect belief and acting under fraudulent intention. To stigmatize a party as one guilty of fraud requires a degree of evidence totally lacking in this case. At most, the findings of the court could have been no more than that Kaufman-Brown Potato Company was acting under a misapprehension of its legal status. The Court goes on to find that by reason of its act and conduct, and in particular by surrendering the assets of Gerry Horton Farms, a co-partnership, to the Trustee for administration and the filing of a proof of debt against Gerry Horton Farms, Kaufman-Brown Potato Company is estopped from denying that it did not consent to the adjudication in bankruptcy. At most, the surrendering of assets would constitute a consent to the administration of such assets by a solvent person under Section 5 (i) of the Bankruptcy Act and could not be deemed to be a consent to the adjudication in bankruptcy. The filing of the proof of debt as set forth above cannot even be construed to be a consent to the administration in bank-

ruptcy of partnership assets on the part of a solvent partner.

Tate v. Brinser, 226 Fed. 878.

The petition in bankruptcy filed by Kaufman-Brown Potato Company and other creditors was against the partnership of Gerry Horton Farms, a co-partnership composed of Gerry Horton and J. D. Althouse, and not against any alleged partnership of which it is alleged to be a member. Consequently we do not see how the doctrine of estoppel can be invoked. Moreover the record is barren of any evidence that there was any holding out of this alleged partnership of Gerry Horton Farms and Kaufman-Brown Potato Company to any creditor. Likewise, estoppel arises only because of some act or omission of a party sought to be charged which, if disregarded, would cause injury to innocent third persons. No evidence to that effect appears in the record here. No one has been injured or will be injured if the Kaufman-Brown Potato Company, a partnership, is not adjudicated a bankrupt. It is personally solvent and creditors can pursue their legal remedies if any against it as if it never had anything to do with the above-entitled case either as petitioning creditor in the involuntary petition or otherwise.

II.

Kaufman Brown Potato Company Was Not a Partner of Gerry Horton Farms.

(a) Any Dealing Between Gerry Horton Farms and Kaufman-Brown Potato Company Was Not an Association for the Purpose of Jointly Carrying on a Business.

In Paragraphs 4 and 7 of each of the agreements between Gerry Horton Farms and Kaufman-Brown Potato Company [Tr. pp. 170-172, 176-178], provision is made for the sharing of profits obtained from the sale of the potato crops, and losses that may be sustained in the planting, raising and harvesting of said crops. We believe that the Court placed undue emphasis on these provisions, and failed to take proper cognizance of a more vital element in connection with what constitutes a partnership, viz., the necessity that there be a purpose of *jointly carrying on the business.*

In

Martin v. Sharp & Fellows Contracting Co., 34 Cal. App. 584, at page 588,

it is said:

> "By section 2395 of the Civil Code, a partnership is defined to be 'the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them.' Under this definition, a mere participation in profit and loss does not necessarily constitute a partnership, for, as said in Dwinel v. Stone, 30 Me. 384, 'there must be such a community of interest as empowers each party to make contracts, incur liabilities, man-

age the whole business, . . . a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased.' To like effect are Coward v. Clanton, 122 Cal. 451 (55 Pac. 147), Vanderhurst v. De Witt, 95 Cal. 57 (50 L. R. A. 595, 30 Pac. 94) and Nofsinger v. Goldman, 122 Cal. 609 (55 Pac. 425), in the former of which it is said that profit sharing is not the true test of partnership. The association must be for the purpose of *jointly carrying on the business.* Mulligan was not interested in the conduct of the business, except in so far as it affected the profits, one-half of which he was to receive for the use of the money, not advanced to the partnership but *loaned to Martin.*"

To the same effect are:

Black v. Brundige, 125 Cal. App. 641 (p. 645);
Spier v. Lang, 4 Cal. 2d 711, at page 716,

and numerous cases cited in the foregoing cases.

It is true the Court in this case finds that Kaufman-Brown Potato Company had the right to make contracts and incur liability on behalf of said partnership, and manage and control the business and jointly carry on the business of said partnership, and that it so did. The evidence, however, is entirely contrary to such finding. The testimony of Gerry Horton [Tr. p. 272] was as follows:

"Q. (By Mr. Colby) You were the manager all the way through this deal, were you not? A. That is correct.

Q. Did they [referring to Kaufman and Brown] interfere in any way whatever in your management of the operations? A. No.

Q. Did they have any right to sign checks on the bank account of the operation on the potato deal? A. No."

The evidence further shows that Kaufman-Brown Potato Company did not have anything to do with the buying of supplies or materials or the hiring or firing of help [Tr. p. 271]. Moreover, the agreements between Gerry Horton Farms and Kaufman-Brown Potato Company provided that the first parties, to-wit, Gerry Horton and J. D. Althouse, co-partners, doing business under the firm name and style of Gerry Horton Farms should devote their best efforts toward planting, raising and harvesting the potato crops, and that they should furnish any and all equipment that may be required [Tr. pp. 173-179]. Moreover, it is provided in said agreements for either the purchase by Kaufman-Brown Potato Company, in which case, of course, marketing would be for their own account, or under certain conditions for the sale by second parties as *agents* for first parties, namely, Gerry Horton and J. D. Althouse, co-partners, doing business under the firm name and style of Gerry Horton Farms. The dealings between the parties therefore did not measure up to that association for the purpose of jointly carrying on business that is required before the association can be said to be a partnership.

(b) Appearance of Word "Partner" in Agreement Does Not Establish That a Partnership Existed.

In paragraphs 4 and 8 of each agreement between the Gerry Horton Farms and Kaufman-Brown Potato Company [Tr. p. 172-179] the word "partner" appears, though in all other parts of the agreement the word "parties" is

used. In that, one may well deduce from the testimony of both Mr. Kaufman and Mr. Horton that the word "partner" was never used in their conversations preceding the signing of the contracts; that its appearance in the agreements was through inadvertence is strengthened when we consider that throughout each agreement the word "parties" appears frequently, and no reason exists why the word "parties" was not used in the isolated instances when the word "parties" would have been more applicable. It is very seldom that the words "partner hereto" are used in agreements, the more usual term being "partners hereof" or "said partners," but the term "parties hereto" is more frequently and appropriately used. Is it too much to assume that a typographical mistake was made, and that the word "partners" could be read "parties" without doing violence to the general import of the contract? For if they were in fact not entering into a partnership relationship, and if the general tenor of their agreement was something else, one word alone would not constitute a partnership, any more than one swallow makes a summer.

Be that as it may, however, the true test of whether a partnership relation exists is whether that relationship measures up to the legal test of a partnership, and not whether the parties called it such. In the case of *Smith v. Grove,* 47 Cal. App. 2d 456, at page 461, it is said:

> "The plaintiffs call to our attention the use of the word 'partnership' in the instrument written October 30, 1930, and to the same word used in the letter from which we have just quoted, and they argue earnestly that therefore the said instrument constituted a partnership agreement. We may not so hold. The trial court made a finding directly to the con-

trary. We are not at liberty to disturb that finding even though we disagreed with the trial court. (6 Cal. Jur. 329.) But we do not disagree with the trial court. The nature of the instrument is not to be determined by what the parties called it. (Kloke v. Pongratz, 38 Cal. App. (2d) 395, 402 (101 Pac. (2d) 522).) Its nature is to be determined by its legal effect. The legal effect of an instrument claimed to be a contract of partnership *must be measured by the rules of law applicable thereto.*"

(c) The Agreements in Question Negative Intent to Form a Partnership, or That a Partnership Existed.

The following elements appear in each of the two agreements which negative the creation of a partnership.

(a) The repayment of the advancement of money made by Kaufman-Brown Potato Company to the bankrupts was secured by a crop mortgage in each instance.

(b) No provisions exist relating to a bank account, or who should draw upon it.

(c) The sale of the potato crop to Kaufman-Brown Potato Company at the prevailing prices, and at its option, was to be made to them as purchasers.

(d) No language appears to the effect that they are entering into a partnership, nor that there is any sale of a partnership interest.

(e) No account is taken therein of the amount of capital to be invested by Gerry Horton Farms, nor does it provide for the usual provision that upon liquidation the parties shall be repaid ratably their capital.

(f) Kaufman-Brown Potato Company was to receive back its loans and advancements from the proceeds of the sales of the potato crops before the Gerry Horton Farms could reimburse itself for the costs and expenditures undertaken to be paid by Gerry Horton Farms.

(g) In paragraph 8 of said agreements, it is provided that in the event there is no prevailing market price for said potatoes upon harvest, Second Parties agree to handle said potatoes as *agents* for First Parties through the Terminal Market at Chicago, Illinois, thus establishing an agency relationship between Kaufman-Brown Potato Company and the First Parties to the contract, viz., Gerry Horton Farms, consisting of Gerry Horton and J. D. Althouse.

(h) The contracts are between Gerry Horton and J. D. Althouse, co-partners doing business under the firm name and style of Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown, doing business under the firm name and style of Kaufman-Brown Potato Company, and signed the same way. No provision is contained for a common name as is usual in a partnership agreement. From the manner in which these agreements were signed, an intention to maintain a clear separation between the Gerry Horton Farms and the Kaufman-Brown Potato Company is evident, as well as an intention to regard Gerry Horton and J. D. Althouse as the sole co-partners of Gerry Horton Farms.

(i) The agreements provide that the First Parties, that is, Gerry Horton Farms, shall not be liable to Kaufman-Brown Potato Company, in connection with the potato transaction, for loss occasioned by inclement weather, acts of God, or losses resulting from acts of

war or causes which are beyond the control of the First Parties, Gerry Horton Farms. Such a clause in the agreements is distinctly out of place if a partnership existed, and it was the intention of the parties that such partnership should exist. If a partnership did exist between the parties, then any such loss should be borne by them equally.

(d) The Conduct of the Parties Under the Agreements Negative an Intent to Form a Partnership, or That a Partnership Existed.

(a) The complete control, management and operation of the Gerry Horton Farms and of the potato crop were in the hands of and actually carried out by Gerry Horton and J. D. Althouse, its partners.

(b) Neither Kaufman nor Brown, nor their partnership, Kaufman-Brown Potato Company, had any part in the management of the business of Gerry Horton Farms or the planting, harvesting and sale of the potato crop [Tr. pp. 271-272].

(c) The leases of the land at Shafter and Arvin to Gerry Horton Farms, executed prior to the dates of the two agreements, and the equipment thereon were never assigned to the alleged partnership, nor did Kaufman-Brown Potato Company ever acquire any interest therein [Tr. pp. 269-270].

(d) Gerry Horton testified that he and J. D. Althouse were engaged in the buying and selling and speculating in

potatoes and produce in general as the Gerry Horton Farms and Gerry Horton Company, in both of which companies he and J. D. Althouse were partners [Tr. p. 254].

(e) The money received from Kaufman-Brown Potato Company for the shipments of potatoes to them was deposited by Gerry Horton, either in the bank account of Gerry Horton Farms, or Gerry Horton Company, and not to the credit of any partnership [Tr. p. 273].

(f) When the transactions involved in the agreements were concluded, Gerry Horton, on July 12, 1944, sent Kaufman-Brown Potato Company checks on which Gerry Horton had caused the words "On Loan" to be placed, which checks were subsequently dishonored and form the basis of the claim now under consideration of Kaufman-Brown Potato Company against the Gerry Horton Farms [Tr. p. 264].

(g) Kaufman-Brown Potato Company had to pay for the potatoes shipped to them by the bankrupts in order to commandeer their delivery [Tr. pp. 273, 260, 172].

(h) The Gerry Horton Farms and the Gerry Horton Company were more or less affiliated, and their operation mixed together [Tr. p. 245].

(i) The Gerry Horton Company made demands on Kaufman-Brown Potato Company for a sum of money which was paid by Kaufman-Brown Potato Company [Tr. p. 243].

(e) Conclusions From the Provisions of the Agreements and the Conduct of the Parties.

From the foregoing, it appears that Kaufman-Brown Potato Company dealt as separate and distinct parties with Gerry Horton Farms and Gerry Horton; no credits were allowed or given as would be usual between partners; the advancements made by Kaufman-Brown Potato Company under the two contracts were treated as loans, in fact, secured for repayment by crop mortgages given them by the bankrupts; when an attempt was made to repay by checks these loans or advancements, Gerry Horton so designated such repayments on such checks; Kaufman-Brown Potato Company and its partners were in Chicago and did not contemplate being on the ground to take part in the operations; the operations and the growing of said crop were all taking place in Kern County, California, under the complete supervision and control of Gerry Horton and J. D. Althouse, as partners of Gerry Horton Farms, and no control or supervision was ever exercised by Kaufman-Brown Potato Company over the growing of the crops or the moneys in the account of Gerry Horton Farms or Gerry Horton Company; and Gerry Horton and J. D. Althouse did as they pleased with the money received from the potato crop, intermingling the accounts of the Gerry Horton Farms and the Gerry Horton Company [Tr. p. 273]. The arrangement in fact was a financing arrangement, whereby the profit to be gained by Kaufman-Brown Potato Company for the advancement of funds was a right to purchase potatoes and to obtain a percentage of the expected profits.

III.

The Order of the Court in Respect to the Allowance of the Claim of Kaufman-Brown Potato Company Was Erroneous.

The findings of fact, conclusions of law and order of the Court in respect to the portion of the claim of Kaufman-Brown Potato Company in the amount of $22,594.82 for money advanced to Gerry Horton Farms are predicated upon the fact of a partnership existing between Gerry Horton Farms and Kaufman-Brown Potato Company, and that the money was advanced to such partnership. The argument in this brief in respect to such alleged partnership as to the question of the propriety of the order of adjudication applies with equal force to the order in respect to the claim. We believe that no such partnership existed, and consequently the order of the Court based upon the premise that such partnership existed is erroneous. We might further add, however, that even though such partnership was properly found to exist, nevertheless Gerry Horton Farms, a co-partnership, composed of Gerry Horton and J. D. Althouse, and an adjudicated bankrupt herein, and its estate in bankruptcy would be liable to Kaufman-Brown Potato Company, the asserted partner of Gerry Horton Farms, engaged in the raising of potatoes for contributions arising out of the advancements made by Kaufman-Brown Potato Company. The total losses were between $20,000.00 and $25,000.00. It thus appears that substantially the total loss fell upon Kaufman-Brown Potato Company. Under the agreement, Gerry Horton Farms, composed of Gerry Horton and J. D. Althouse were obligated to stand certain prescribed percentages.

Under any circumstances, therefore, the order of the Court in respect to the claim filed by Kaufman-Brown Potato Company was erroneous.

Conclusion.

We submit, therefore, that from the facts and the law the three orders involved in this consolidated appeal and likewise the orders of the Referee as amended, adopted and confirmed by the Court are erroneous and should be reversed in that:

1. The proceedings had in this case did not permit or justify the Court in entering an order adjudicating Gerry Horton Farms, an alleged co-partnership, engaged in the raising of potatoes, a bankrupt.

2. There was no partnership composed of Gerry Horton Farms and Kaufman-Brown Potato Company.

3. The claim of Kaufman-Brown Potato Company against the bankrupts should have been allowed as a general unsecured claim.

Respectfully submitted,

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